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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 987

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, CITY OF CORINTH, MISSISSIPPI, *Respondents.*

SUPPLEMENTAL APPENDICES

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Opinion No. 534 of the Federal Power Commission and its order denying rehearing are separately reprinted herein from the Joint Appendix (J.A.). Page numbers of the record as certified are printed in bold face type. Numerical paging of the Joint Appendix is printed in light-faced type at the bottom of each page.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Interconnection of Facilities; Sale of Natural Gas
Mutual Exclusivity

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Docket No.
CP66-336

ALABAMA-TENNESSEE NATURAL GAS COMPANY

Docket No.
CP67-62

CITY OF CORINTH, MISSISSIPPI v. TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

Opinion No. 534

Opinion and Order Directing Interconnection of Facilities and Sale of Natural Gas and Denying Application for Construction of Pipeline.

(Issued November 30, 1967)

WHITE, Chairman:

These consolidated proceedings involve: (1) an application by Alabama-Tennessee Natural Gas Company (A-T) pursuant to Section 7(c) of the Natural Gas Act (Act) for authorization, at an estimated cost of $42,900, to construct and operate 2.5 miles of 3-½-inch O.D. lateral pipeline paralleling existing 3-½-inch O.D. lateral pipeline and to increase its ability to deliver gas to Corinth under maximum daily flow conditions from 5,725 Mcf to approximately 11,500 Mcf; and (2) an application by the City of Corinth

(Corinth) under Section 7(a) of the Act requesting the Commission to issue an order directing Tennessee Gas Pipeline Company (TGP) to establish an interconnection with facilities to be constructed by Corinth and to sell to Corinth during the years 1967, 1968, 1969 and up to January 31, 1970 all of Corinth's natural gas requirements over and above its present contract quantity with A-T of 3,850 Mcf per day, and on and after February 1, 1970 all of Corinth's natural gas requirements.

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Background

The City of Corinth, Mississippi, located just south of the Mississippi-Tennessee state line owns and operates a municipal gas distribution system and distributes natural gas to consumers located within the corporate limits of the City and in an area immediately adjacent to the City's boundaries. Natural gas service was initiated in June 1952 and all of its natural gas requirements from that date and to the present have been and are supplied by A-T under a succession of agreements expiring February 1, 1970. In addition, Corinth operates a peak shaving plant capable of producing 80 Mcf per hour from which it supplements its natural gas supply when necessary to satisfy its customer's need. It is estimated that the plant will supply 600 Mcf to the system on the peak day. As of December 31, 1965, the City served a total of 3,226 customers and it is estimated that this will increase to 4,150 by 1972.

The capacity of A-T's lateral pipeline serving Corinth has been reached, and if A-T is to continue to meet Corinth's requirements, it will be necessary for it to construct 2-½ miles of loop line from its main transmission lines to Corinth's system to provide additional capacity.

The present service agreement between Corinth and A-T specifies a maximum daily quantity of 3,850 Mcf but since 1960, or possibly earlier, A-T has been delivering volumes of gas to Corinth in excess of 3,850 Mcf. In January 1966, A-T delivered a maximum daily volume of 5,229 Mcf for which the City has been billed and paid demand charges, and in December 1966 a new peak volume of 5,243 Mcf was established on which Corinth will pay a demand charge through November 1967, unless this volume is exceeded at a later date. The City has been unwilling to enter into a new service agreement with A-T after the expiration date of the present agreement on February 1, 1970, and Corinth is now requesting an order of the Commission directing TGP to sell to Corinth, commencing in 1967, its estimated natural gas requirements in excess of 3,850 Mcf until the expiration of its contract with A-T on February 1, 1970, and at that time and thereafter to sell to Corinth all of its estimated natural gas requirements.

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In order to obtain gas from TGP, Corinth proposes to construct 2.75 miles of 8-⅝-inch O.D. pipeline from a proposed regulator station at the eastern edge of the City to a point of connection with TGP's Kinder-Portland line. The total estimated cost of this project is $100,000, to be financed with cash which the City now has on hand. It is estimated that the cost of facilities to be constructed by TGP would be approximately $26,275. The maximum flow capacity of Corinth's proposed connecting line is about 16,083 Mcf per day, assuming TGP's minimum guaranteed delivery pressure of 200 psig at TGP's mainline and a pressure at the city gate of 125 psig.

Holding

Presiding Examiner Arthur H. Fribourg's initial decision of April 28, 1967, granted in part and denied in part

the Section 7(a) application of Corinth. He directed TGP to connect its facilities with those of Corinth prior to February 1, 1970, and on February 1, 1970 to commence the sale of natural gas to Corinth under TGP's G-1 rate schedule. He denied Corinth's request for an order directing TGP to connect its facilities with Corinth's by the 1967-1968 heating season, and to sell to Corinth from that date to the date of termination of Corinth's service agreement with A-T Corinth's requirements in excess of 3,850 Mcf, the maximum daily quantity stated in the Corinth-A-T service agreement. He denied A-T's application to construct and operate a lateral for service to Corinth paralleling the existing service lateral but authorized A-T to loop a segment of the existing service lateral which would provide sufficient capacity until February 1, 1970, for the sale and delivery to Corinth of its estimated requirements to that date, provided Corinth contributes to A-T 90 percent of the cost of the loop.

This proceeding which is before us on exceptions to the initial decision, involves mutually exclusive proposals within the meaning of the *Ashbacher* doctrine.[1]

We agree with the Examiner's conclusion that an order should issue under Section 7(a) of the Act requiring TGP to connect its facilities with those of Corinth and on February 1, 1970 to commence the sale of natural gas to Corinth under TGP's G-1 rate schedule. We also agree that A-T's application to construct and operate a lateral for service to Corinth paralleling the existing service lateral should be denied. However, for reasons

[1] *Ashbacher Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945).

expressed herein we are not authorizing A-T to loop a segment of the existing service lateral as the Examiner

recommended for the interim period ending February 1, 1970, but instead are ordering the delivery of natural gas by TGP to Corinth through facilities to be constructed by Corinth and connected therewith by TGP for the account of A-T of that volume of natural gas which exceed the safe capacity of A-T's existing lateral.

The problem presented by this case is a simple but important one which illustrates the increasingly competitive nature of the pipeline industry: whether a distributor customer of a pipeline must continue to take from the present supplier even though a cheaper source of gas is readily available. Resolution of this issue necessarily involves a weighing of the benefits to the distributor and its customers as well as the impact which a changeover would have on the present supplier and its customers. Consideration of the entire record in this proceeding convinces us that the public interest is best served by authorizing the changeover, thus taking advantage of the economies which competition has made available.

Discussion

Corinth desires to purchase gas from TGP under the same terms and conditions and rate as appears in the latter's G-1 rate schedule and the city's studies are based on this premise. By the arrangement proposed by Corinth, it would realize substantial savings as compared to purchasing gas from A.T.[2] Although there would be no savings in the year in which the purchase of gas from

[2] The charges under the presently effective G-1 rate schedules of TGP and A-T are:

	TGP @ 15.025	TGP @ 14.735	A-T @ 14.735
Demand Charge	$ 1.99	$ 1.95	$ 2.69
Commodity Charge	20.84¢/Mcf	20.44¢/Mcf	24.29¢/Mcf

(1144)

TGP is scheduled to commence, immediate savings would be realized thereafter as follows:

1969	$ 27,600
1970	32,000
1971	100,800
1972	97,100

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Over the 20-year term of the service agreement with TGP, the savings to the consumers from the city's purchase of natural gas from TGP would be at least $2,000,000 based on the projected level of purchases from TGP under rate schedule G-1.

A-T contends that the economic detriment to its other customers would be substantial if Corinth is supplied directly by TGP. It asserts that its gross profit on sales to Corinth in 1964 was $71,081, and claims that the loss of this business would be equivalent to 0.68 cents per Mcf when prorated among sales to its other customers.[3] Based on the expected increase in the Corinth load between now and 1971 A-T estimated the increase in annual gross profits thereon to be approximately $100,000.

As the Examiner correctly pointed out, it is improper to assume that loss of a particular customer shows the extent of deterioration to be expected, citing *Lynchburg Gas Co.* v. *F.P.C.*, 336 F.2d 942, 947-8. Loss may be more than offset by an increase in other sales.[4] Here the record shows that the reduction in sales which will result from the loss of the Corinth load can be expected to be offset by increases in sales to other customers of A-T. The company itself has made estimates of a peak day of 96,340 and

3 1964 is the basis for the rates made effective September 1, 1965, in A-T's latest rate case, 34 FPC 767.

4 *Columbia Gulf Transmission Co.*, Opinion No. 512, January 24, 1967.

annnal volume of 16,195,400 Mcf for wholesale sales in 1970, including Corinth. Elimination of the estimated Corinth load would leave peak day wholesale sales of 90,210 and annual wholesale sales of 15,204,400. This compares with an estimated 1966 peak of 89,710 and an estimated 1966 volume of 12,914,200, both of which, of course, include Corinth. The actual year 1964 was much below the 1966 estimate, so that the growth from 1964 to 1970, assuming the loss of the Corinth load in the latter year, exceeds that loss by a wide margin. In 1964 the peak was 67,841 Mcf and the annual volume was 11,261,946. The comparison of 1964 actual figures with 1970 estimates does not indicate that loss of the Corinth business in 1970 would burden A-T's other customers. Indeed, the prospective loss would be more than made up before it is actually

incurred, since it will be more than offset by normal growth elsewhere on the system.

A-T argues that it will incur a detriment due to the loss of the Corinth account because "the capacity now being used to serve Corinth will not be available to the other customers if the abandonment is permitted." It asserts, moreover, that additional sales to other customers will not offset loss of Corinth revenues since such additional sales must be first offset by additional costs of constructing, operating and maintaining the additional facilities required to produce them.

The Examiner's decision correctly points out that except for possibly $40,000, all of A-T capital investment in the Corinth line will have been recovered by 1970, and the $40,000 can, if necessary, be written off by A-T over a period of years without adverse effect on its remaining customers. Thus, A-T's argument is without merit, unless, of course, it is really contending that its loss of profits

from Corinth should be made up by its remaining customers. But there is no valid reason why the public interest should require that A-T's profit level be maintained by its remaining customers, and we have never so declared. Moreover, this $40,000 is not the true measure of economic detriment resulting therefrom to either A-T or its remaining customers.

A-T uses a composite group depreciation rate of 3.2 percent for all transmission properties which includes laterals, sales meter stations, and check meter stations; the three types of facilities included in the "Corinth lateral." Inherent in group depreciation theory is the assumption that some facilities will be retired before expiration of their average service life but these early retirements will be offset by facilities which remain in service longer than their average service life. Most natural gas pipeline companies subject to the jurisdiction of this Commission use a composite group depreciation rate, as does A-T, and for accounting purposes treat premature retirements as ordinary retirements. The Corinth lateral consists of pipeline, a sales meter station, and a check meter station which at February 1, 1970, will have estimated original cost and accumulated depreciation as follows:

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	Pipeline	Sales Meter Station	Check Meter Station	Total
Original Cost	$35,484	$25,978	$7,596	$69,058
Accumulated Depreciation	20,521	6,733	2,897	30,151
Net Original Cost	$14,963	$19,245	$4,699	$38,907

This of course, does not take account of the fact that any detriment to A-T may be minimized by salvaging some portion of the sales and check meter stations which

account for approximately 60 percent of the unamortized investment.

In considering whether Corinth should be required to compensate A-T for this detriment we conclude that it should not. The traditional ratemaking philosophy of this Commission has not been used on a policy of determining the cost of service for individual customers by isolating the costs of specific facilities necessary to serve that customer. Requiring Corinth to make a payment to A-T because it had not recovered, through depreciation charges, all capital costs related to the specific facilities necessary to serve Corinth would be inconsistent with this long-standing Commission ratemaking philosophy. Retirement of the Corinth lateral in 1970 will, we assume, be treated by A-T as an ordinary retirement in accordance with its regular depreciation practices and the theory underlying group depreciation.

We wish to make it clear, however, that the early retirement of facilities which may result from the switching of suppliers is an important, if only one, of the factors which must be weighed in determining whether a switchover is in the public interest. In this proceeding the impact resulting from the switchover is insubstantial; however, it is possible that in another proceeding this factor could be of such magnitude as to tip the scales against allowing a switch in suppliers, when it is considered together with all the other relevant factors.

We are not unmindful of the fact that A-T's growth would be even greater were it allowed to keep the Corinth load and that, as a result, its customers might enjoy some additional

economies. But we would be derelict in our duty if we were to ignore the immediate and measurable benefits to

Corinth on such a theoretical and speculative loss to other A-T customers. Such a rationale would inevitably bind a customer to its existing supplier, thus effectively preclude the realization of the fruits of competition. Moreover, this Commission in its recent decision in *Algonquin Gas Transmission Co,*. Opinion No. 522, June 27, 1967 (slip-op. p. 15) pointed out that "we have made clear 'that a pipeline has no vested interest in a market that must be perpetually protected by regulation.'" Citing *Columbia Gulf Transmission Co.,* Opinion No. 512, January 24, 1967, and *City of Hamilton, Ohio,* Opinion 513, January 24, 1967, in support. As we said in *Algonquin* "Congress has entrusted this Commission with a mandate to assure natural gas service to ultimate consumers at the lowest reasonable rates." On this record, service by TGP will effectuate that mandate.

In our consideration of A-T's probable future we are aware that its rates reflect tax savings resulting from the use of liberalized depreciation. In *Alabama-Tennessee Natural Gas Co.,* 31 FPC 208, aff'd 359 F. 2d 318 (CA5, 1966), we concluded that flow through was applicable to pipelines which maintain a growing or stable gross plant and that A-T was such a pipeline. The record here confirms the wisdom of that finding for, by A-T's own admission, even without Corinth it expects to serve increased loads through 1970. Moreover, as contemplated in *Alabama-Tennessee,* if subsequent events should establish that by reason of the loss of the Corinth load or for other reasons, A-T, other than temporarily, is no longer maintaining a growing or stable gross plant there will be ample opportunity for it to seek review of its rates and request appropriate relief.

A-T contends that the issue of the loss of Corinth as a customer should be governed by the abandonment principles of Section 7(b) which requires a hearing and finding

that "public convenience or necessity permit such abandonment." This position that a customer seeking a new source of supply is analogous to an abandonment proceeding is a distortion of the purposes of Section 7(b) which is designed to protect the consumer's right to a continuing source of supply. It is not designed to bind the customer to any given source of supply.

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A-T's reliance on *Michigan Consolidated Gas Co.* v. *F.P.C.*, 283 F. 2d 204 (CADC 1960), *cert. den.* 364 U.S. 913, in support of its thesis that this must be considered an abandonment is not well taken. The consideration and emphasis in an abandonment case, as the court there indicated, is the impact *on the party being abandoned.* In the instant case the party being abandoned—more correctly, separated; albeit at its own request—is Corinth, not the other customers of A-T. The other customers will continue to be served. Hence, even if the Commission were to consider that Corinth's application is, as A-T contends, subject to Section 7(b), it would be constrained to determine the impact upon the ultimate consumers abandoned by (or separated from) A-T—to wit, the Corinth citizenry. When viewed in such light, the public convenience and necessity loom largely in favor of allowing the consumers access to lower priced gas.

The discussion thus far has been based on the premise that Corinth would be eligible for service under TGP's presently effective rate schedule G-1. Subparagraph (a) of the G-1 rate provides that service under this schedule is available to any buyer:

> "(a) which will purchase said gas for resale in a specified area or areas which, at the date of the commencement of service by Seller to Buyer for such area or areas, was not being served with natural gas;"

Both TGP and A-T argue that since the area served by Corinth is now receiving natural gas service, Corinth is ineligible to receive service under the terms of TGP's presently-effective rate schedule G-1.[5] It is claimed Corinth is only eligible for firm service under TGP's rate schedule CD-1 and that by reason of the operation of the

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minimum bill provision in rate schedule CD-1, the cost of Corinth's proposed gas purchases from TGP would exceed that asserted by Corinth. Corinth, on the other hand, presented evidence attempting to show that the above existing tariff provision is unreasonable. TGP objected to the admission of Corinth's evidence relating to the reasonableness of its tariff. It argues that certificate cases are not the proper place to consider the reasonableness of filed tariff provisions, citing *Tennessee Gas Transmission Co.*, 32 FPC 112; *Atlantic Seaboard Corp.*, 28 FPC 1145; *Atlantic Seaboard Corp.*, 24 FPC 474; *Commonwealth Natural Gas Corp.*, 9 FPC 70.[6]

Whether the Commission should preclude consideration of reasonableness of tariff in a certificate case is not an issue which the Commission need face in reaching a decision herein inasmuch as we conclude that Corinth will be eligible to take service pursuant to TGP's G-1 rate schedule after January 31, 1970.

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[5] During the hearing TGP contended that even after 1970 Corinth would not continue to be eligible for G-1 service, since the area served by Corinth would be receiving natural gas service at the date Corinth proposes to commence purchasing gas from Tennessee. TGF did not, however, except to the Examiner's determination to the contrary.

[6] TGP also excepted to the Examiner's denial of TGP's motion to strike Corinth's evidence that TGP's "availability" provision in its G-1 schedule was unreasonable. Inasmuch as the Examiner expressly stated that he did not rely on this evidence TGP's exception to his denial appear to be moot.

The G-1 tariff was established in 1947 and up to 1951 it was available to any entire-requirements purchaser for resale who signed a contract limiting TGP's obligation to a maximum daily peak. In that year language was added to limit the availability to any such purchaser for resale in an area which, on the date of the contract, was not being served with natural gas. The present wording, which refers to the date of the commencement of service instead of the date of the contract but is otherwise substantially the same as the 1951 version, first appeared in 1954.

At least one change in the availability section appears to have been directed towards limiting the schedule to those customers who buy from TGP all the natural gas they sell in any area. In 1951, at the same time that the limitation here in issue appeared, there appeared a limitation confining the schedule to customers who own no natural gas production, do not purchase from producers, and have no underground gas

storage facilities. When this provision is read together with the other, it appears that the object was to limit the G-1 schedule to full-requirements purchasers for resale in areas whose entire natural gas needs were supplied by TGP throughout the year. It is clear, therefore, that the G-1 tariff is not available to Corinth before 1970. On the other hand, there can be no contradiction that in 1970, after termination of its A-T contract, Corinth will have only one source of supply, TGP. At that point the reason for requiring it to buy under the CD schedule disappears. It would then be a full-requirements customer, and would be in the same position towards TGP as any other full-requirements customer.

It is uncontested in the record that Corinth's present needs exceed A-T's maximum safe deliverability on the

installed lateral and that additional facilities are needed to handle the increasing load between now and February 1, 1970. It was in recognition of this and the fact that purchasing gas from TGP under its CD-1 schedule would be substantially more costly than the purchase of all the requirements from A-T that the Examiner recommended the looping of the existing A-T lateral, even though he fully recognized that the line would be of no further use after 1970. We see no reason for reaching this result which, as the Examiner recognized, necessitates the looping of a lateral which will have no economic value after 1970. Instead, therefore, we are permitting the immediate construction of the proposed lateral from Corinth to TGP which, in any event, will be needed for service after 1970; and ordering TGP to deliver to Corinth for the account of A-T the volumes of natural gas which exceed the safe capacity of the existing lateral.

Our holding here means that until February 1, 1970, Corinth remains a full-requirements customer of A-T, even though TGP is delivering part of those requirements directly. This resolution avoids both the economic waste inherent in looping the existing lateral and the additional cost which would be necessitated by receiving gas from TGP under its higher CD schedule. It also permits the continued use of existing A-T facilities to their maximum safe capacity.

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In determining that Corinth be permitted to build a lateral and to purchase from TGP at the G-1 rate beginning February 1, 1970, we have considered the alternatives of a transportation'' or ''delivery for the account of'' arrangement which would permit the continued utilization of A-T's existing Corinth lateral. However, either of these arrangements would be more costly than Corinth's proposal for a direct connection with TGP. Were A-T to

transport the gas, the charges would either have to be allocated directly to Corinth, in which event they would exceed the costs of transportation via a Corinth built lateral, or they would have to be rolled into A-T's costs for the entire system. This latter alternative would in effect not only require other A-T customers to bear the burden of some share of the transportation charges, but would result in Corinth's share exceeding its costs of transport via a Corinth owned lateral. Accordingly, considered on its own merits or comparatively with these alternatives, the proposel which we are certificating results in substantial savings to Corinth and is in the public interest.

There is some dispute about the maximum safe peak-day capacity of A-T's existing lateral. The Examiner found that this was 5,300 Mcf. We accept this figure as reasonably supported by the evidence introduced by Staff's witness and based on the USA Standard Code for Pressure Piping, Gas Transmission and Distributing Systems, American Society of Mechanical Engineers.[7]

The construction and interconnection by TGP and Corinth of their respective facilities will negate the necessity for enlarging A-T's present lateral and, accordingly, its application is denied. No useful purpose is served therefore in discussing the relative merits of A-T's proposed construction as against the looping of its lateral as ordered by the Examiner.

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[7] Calculating a peak hourly flow of 281 Mcf (peak-day 6,750 Mcf) and utilizing the same 5.3 percent ratio of peak hour to a peak-day revealed by A-T's own studies, Staff's figure would be 5,300 Mcf.

In the course of these proceedings and in its exceptions to the Examiner's decision, TGP contended that A-T should continue to be the exclusive source for Corinth since A-T performs a very valuable function as a regional

pipeline system. TGP contends that the solution to Corinth's problem is not to construct duplicate and unnecessary facilities but rather to correct A-T's rate design in an appropriate rate proceeding.

TGP's suggestion assumes that it would be proper to establish rate zones on the A-T system and that the rate zones so established would afford Corinth savings equivalent to those realized by direct purchase from TGP.

We do not believe that a decision whether or not the present applications are necessary or desirable in the public interest can await a determination whether A-T's rate structure should, after a full blown rate case, be redesigned to afford relief to Corinth. Moreover, we could not even begin to speculate at this time as to whether that would in fact be the result of a rate case; it is at least worth noting that A-T itself has not come forward with redesigned rates to reflect this possibility. The result we reach herein does not require our considering whether A-T's rate design should be changed and we see no public interest consideration which would be served by introducing this complex rate design problem into this proceeding.

The Commission further finds:

(1) Tennessee Gas Pipeline Company is a "natural gas company" within the meaning of the Natural Gas Act.

(2) The City of Corinth, Mississippi, is a municipality engaged in the local distribution of natural gas to the public.

(3) Alabama-Tennessee Natural Gas Company is a "natural gas company" within the meaning of the Natural Gas Act.

(4) It is necessary and desirable in the public interest that Tennessee Gas Pipeline be directed to establish phy-

sical connections of its gas transmission system with the existing and proposed facilities of City of Corinth, Mississippi.

(5) It is necessary and desirable in the public interest that Tennessee Gas Pipeline Company until February 1, 1970, deliver directly to the City of Corinth, Mississippi, for the account of Alabama-Tennessee Natural Gas Company all natural gas needed by the City of Corinth, Mississippi, as shall exceed 5,300 Mcf per day.

(6) It is necessary and desirable in the public interest that on and after February 1, 1970, Tennessee Gas Pipeline Company, pursuant to its G-1 rate schedule, sell and deliver natural gas to the City of Corinth, Mississippi.

(7) The proposed construction as set forth in the Section 7(c) application of Alabama-Tennessee Natural Gas Company is not required by the present or future public convenience and necessity.

(8) The sale and delivery of natural gas to the City of Corinth, Mississippi, will not place any undue burden on Tennessee Gas Pipeline Company nor impair its ability to service its existing customers.

The Commission orders:

(A) Tennessee Gas Pipeline Company will establish a physical connection of its transmission system with facilities to be constructed by the City of Corinth in accordance with its Section 7(a) application and on and after February 1, 1970, pursuant to the G-1 rate schedule of Tennessee Gas Pipeline Company, sell and deliver to the City of Corinth all of its natural gas requirements.

(B) Within 30 days of the completion of the facilities to be constructed by the City of Corinth, Tennessee Gas Pipe-

line Company shall until *February 1, 1970* deliver directly to the City of Corinth, for the account of Alabama-Tennessee Natural Gas Company, the natural gas requirement of the City of Corinth in excess of 5,300 Mcf per day.

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(C) The Section 7(c) application of Alabama-Tennessee Natural Gas Company is denied.

(D) Tennessee Gas Pipeline Company shall report to the Commission in writing the date of the connection of its facilities with the facilities of the City of Corinth, within ten days thereof.

By the Commission. Commissioner Carver concurring filed a separate statement appended hereto.

(SEAL)

GORDON M. GRANT,
Secretary.

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Docket No. CP66-336

ALABAMA-TENNESSEE NATURAL GAS COMPANY, ET AL

(Issued November 30, 1967)

CARVER, Commissioner, concurring:

The expiration of the service agreement between Corinth and Alabama-Tennessee in 1970, under precedent of the Commission to which I have not dissented, leaves Corinth free to change suppliers.[1] The use of section 7(a) of the Natural Gas Act as authority for the interim arrangement between now and the date of the expiration of the service agreement presents problems of a legal nature which I will discuss hereafter, but my reservations about the Commission's authority to do what it has done do not compel

[1] *City of Hamilton*, 37 FPC 209, Opinion No. 513, issued January 24, 1967.

a dissent, principally because the passage of time would render the question moot before the matter could be judicially tested.[2]

Therefore, I concur in the result, but feel compelled to state views which although perhaps not at variance with those of the Commission, nevertheless are not treated in the Commission's Opinion with the analytical depth I think warranted.

It is important to understand the physical situation of the parties. Alabama-Tennessee is a customer of Tennessee operating, under certificate from this Commission,[3] a 130-mile pipeline which presently serves, *inter alia*, Corinth, Florence, Sheffield, Athens, Decatur, and Huntsville. All of these municipalities have service agreements with Alabama-Tennessee, each taking peak-day volumes ranging between 2448 Mcf for Athens to 35,044 for Huntsville.

When the first service agreements were entered into with these municipalities, Tennessee supplied gas to Alabama-Tennessee in southwestern Tennessee. Since that

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[2] *Algonquin Gas Transmission Co.*, 37 FPC —, Opinion No. 522, issued June 27, 1967, presented the issue much more clearly and that case was not appealed.

[3] 7 FPC 251.

time, Tennessee has constructed two lines east of its mainline, each of which intersects the Alabama-Tennessee pipeline. The westerly of these two lines, the Kinder-Portland line, runs close enough to Corinth to precipitate the instant proceedings; it is to this line that the Commission is authorizing Corinth to connect.

Sheffield and Florence, both located east of Corinth, are equivalently proximate to the second Tennessee line—the Delta-Portland line. This line parallels the Kinder-Portland line.

The original service agreements with Sheffield and Florence expire shortly after the Corinth expiration date, respectively in 1970 and 1971.

This circumstance presents the Commission with the duty of considering the consequences of its action in authorizing Corinth to take advantage of the "savings" involved in purchasing "wholesale" from Tennessee, rather than "jobber" from Alabama-Tennessee.

One consequence is the prospect of so reducing the volume of Alabama-Tennessee's sales as to fix an undue burden on the remaining customers to pay for a disproportionate share of the fixed costs associated with the certificated investment of Alabama-Tennessee.

The other result is the prospect that for some reason associated with a regulatory decision, consumers of gas in Florence and Sheffield (or other communities) will be denied the reduction in purchased gas costs which the shift in suppliers authorized today makes possible for the consumers in Corinth.

On the face of it, the latter problem is the more real one. As to the former problem, the fact that based on 1966 actual sales, Sheffield, Florence, and Corinth together account for 23% of the jurisdictional volumes and 24% of the jurisdictional revenues of Alabama-Tennessee virtually dictates that further incursions into Alabama-Tennessee's markets will not be authorized lightly.

Furthermore, there is a difference in circumstance between Corinth and the other two towns. It is this difference which requires deeper analysis, since a different result would seemingly be justified if the whole of the

problem was presented to this Commission at one time. Specifically, only Corinth's entire contractual obligation

to Alabama-Tennessee expires in 1970—for the other two municipalities, the base load contracts expire in 1970 and 1971, but incremental volumes are furnished under service agreements which run twenty years from the date of execution, and thus do not expire coincident from the date of execution, and thus do not expire coincident with the base load agreement. The contracts for volumes other than the base loads run until 1985 and 1986, respectively for Florence and Sheffield.

The reason Corinth is differently situated is not to be found in a difference of circumstance, treatment, or policy so far as Alabama-Tennessee is concerned—rather it reflects the fact that Corinth after 1956 refused to sign any more superseding agreements with expiration dates beyond 1970, and as the Commission Opinion makes clear, Corinth's needs beyond 3,850 Mcf per day are not covered by any agreement other than Alabama-Tennessee's full requirements clause. Its peak has exceeded this amount since at least January 3, 1960.

Corinth formed the intention to shift to Tennessee, and by its own testimony, thereafter refused to enter into any new service agreements because ". . . it planned to purchase natural gas from Tennessee which had since completed its Kinder-Portland line located approximately 2-¾ miles from Corinth, and wanted to be free to do so at the expiration of its contract with Alabama-Tennessee." [Tr. 26]

It may help identify the regulatory problem presented here if we should postulate the circumstances of the original lateral from Alabama-Tennessee to Corinth being physically limited in its capacity to the originally-certificated peak volume of 3,850 Mcf. In other words, suppose that Alabama-Tennessee, instead of needing certificate authority to construct new facilities within 24 to 36 months of

the expiration of its agreement, had been asking for such authority five or ten years ahead of the expiration of the existing service agreement.

If the issue had been presented in such a context, would the Commission have supported Corinth in a refusal to sign an agreement beyond 1970, or would it have supported Alabama-Tennessee in a refusal to construct new facilities without 20 years' protection as to the new

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facilities?

The Commission, in such a situation, in all likelihood would have finessed the problem, as the Examiner did in the case now before us, by supporting Corinth's refusal to enter into an extended agreement, while ordering the city to contribute aid to the cost of the construction of the needed expansion. Presumably, the ninety percent share assessed to the city by the Examiner was related to the brevity of the remaining contract term.

But this would not have vitiated the issue which concerns me. In the framework of this case, that issue is not whether long-term, short-term, or indeed any service agreements, are in the public interest; it is rather the latent issue of discrimination.

The Commission should not feel satisfied in its accomplishments in achieving cheaper purchased gas costs for Corinth (and presumably the gas consumers of Corinth). The responsibility of regulation is not this narrow. In any given case, efforts ought to be focused on the largest practicable segment of the gas consuming public, rather than the smallest. What most deeply disturbs me about the Opinion today is that it does not squarely face the evident problem of how equivalent, nondiscriminatory treatment is to be achieved for the gas consumers served

by other distributors on the Alabama-Tennessee line. The consumers of gas in Florence and Sheffield can be expected to be informed of what is happening in Corinth. Are they going to be satisfied with the lame excuse by this Commission that they should blame their city councils, rather than the Federal Power Commission, for what to them is going to appear to be rank price discrimination?

It is entirely possible that an even more embarrassing question might soon be presented to the Commission: The *base load* of Florence and Sheffield will not be covered by a contract after 1970 and 1971. Using the Commission's rationale about "savings", these communities could well compute a price advantage, based upon shifting to Tennessee as a full requirements customer at that time, even after honoring their contracts with Alabama-Tennessee by paying to Alabama-Tennessee the minimum bill under its filed

tariff.[4] Using 1966 actual purchases as the basis of comparison, and the 60% clause of the contract, there would still be "savings" in such a shift as compared with the purchased gas costs of staying with Alabama-Tennessee:

	1966 actual purchased gas costs paid to Alabama-Tennessee		Cost under Tennessee's G-1 rate, plus minimum demand paid to Alabama-Tennessee	
	Vol. (Mcf)	*Cost*	*Cost*[a]	*Savings*
Florence	1,459,562	$692,630	$587,202	$105,428
Sheffield	712,972	$336,738	$281,581	$ 55,157

[a] Includes minimum demand bill paid to Alabama-Tennessee of $39,120 for Florence and $15,012 for Sheffield.

[4] See Alabama-Tennessee Natural Gas Company's filed tariff: First revised sheet No. 6 and second revised sheet No. 8 of the first revised Volume 1. The minimum monthly bill equals the demand charge. The demand charge is equal to the higher of: (1) the greatest day's delivery during the 12-month period ending on the day of the billing month, or (2) 60% of the maximum demand obligation in the service agreement.

If such should transpire, the Commission will have to deal with another problem not grappled with in this Opinion—whether Tennessee's G-1 schedule would be denied to these other communities, on the basis that the annual "tribute" involved in paying a supplier for the balance of the contracted period amounted to a split in its load such as to disentitle the use of the cheaper full-requirements rate. The computed minimum demand charge payable to Alabama-Tennessee based on the volumes covered by the incremental agreements would be $39,120 for Florence, and $15,012 for Sheffield. These payments measure the additional cost to the municipalities who signed up with

Alabama-Tennessee as compared to following a course of conduct like Corinth's.

The issue in reality is now before us because Alabama-Tennessee is seeking certificate authority to construct facilities needed to meet Corinth's needs at least until February 1, 1970. Upon whom does the responsibility for getting gas to Corinth presently rest? Obviously Alabama-Tennessee cannot be required to exceed the physical limits of its installed lateral (5300 Mcf per day), nor may it expand this capacity without Commission certification. Equally as obviously, some kind of mutuality must attend the contract between Corinth and Alabama-Tennessee; Alabama-Tennessee having the duty to serve Corinth, it also should have the *right* to serve Corinth. This latter right is honored by disallowing Corinth the full use of its newly authorized lateral connecting with Tennessee until the contract runs out, and furthermore requiring Corinth to pay Alabama-Tennessee for all of its takes, at a rate higher than that charged by the actual supplier.

This raises the question posed at the outset, namely the legal authority to take the action relating to the interim

period. As I stated, the problem has practical limitations which dissuade me from dissenting, but not from discussing.

The needs of Corinth's customers for the next three winters (including the present one), apparently become its own responsibility to the extent these needs exceed the safe capacity of the existing Alabama-Tennessee lateral. Alabama-Tennessee is relieved of this responsibility, and it is not imposed upon Tennessee. The reason, of course, is that it may not be imposed upon Tennessee without a frontal assault on the Commission-approved contract between Corinth and Alabama-Tennessee. Corinth is not ordered to construct the lateral; it is only permitted to construct it. Tennessee is granted authority to connect the new lateral after it is built, but even then it has no authority from the Commission to make a sale to Corinth before 1970 because until that date Corinth's contract with Alabama-Tennessee is binding. This problem is met, presumably, by utilizing the authority of section 7(a) to

order Tennessee to deliver gas to Corinth, not on its own account, but on the account of Alabama-Tennessee. In this case, although the authority is less clearly *sua sponte* than it was in *Algonquin*,[5] its application here, as in that case, moves in the direction of the Commission taking responsibility for feasibility and service planning which the regulatory scheme set forth in the Natural Gas Act imposes on the utility, not the agency.

Both in theory and in practice, this permissive approach to meeting a community's requirements for gas poses problems. Suppose it should be found that some legal barrier prevented Corinth from constructing the line outside

[5] *Algonquin Gas Transmission Co.*, 37 FPC —, Opinion No. 522, issued June 27, 1967.

its municipal boundaries.[6] There is no regulation-ordered assurance that the gas consumers of Corinth will actually receive additional quantities of gas above the present capacity of the Alabama-Tennessee line, and there is no record basis for the interim measures devised by the Commission.

The Commission's concern for the welfare of the consumers is not bounded by the city limits of Corinth; it must look to the other customers of Alabama-Tennessee, and beyond. If other customers, as a result of a series of Corinth-type actions may be saddled with additional fixed costs, it is no answer to say that their problems can be met in later cases—by then it may be too late.

If an expert body can see that other customers will demand equivalent treatment, it is no answer to lean upon

[6] Cf. *American Louisiana Pipe Line Company*, 30 FPC 698, 708, wherein the alternative of service by a franchised distributor rather than by the pipeline was favored by a majority of the city council, although the vote was one short of the number required to sanction the action under local law. In that case, the city was permitted to build a 32-mile lateral, although an interconnection with the distributor would have entailed only a 4-mile lateral.

artificially legalistic reasoning, such as the presence or absence of service agreements. This too is a problem of regulation.

And most important of all, the Commission owes it to other consumers and the regulated companies to set forth the boundaries of the neo-competition involved in a customer shifting to its supplier's supplier.

To consider Tennessee a "competitor" of Alabama-Tennessee is to abuse the word, so long as Alabama-Tennessee is a customer of Tennessee. To call this competition is to open the same semantics the Commission's stated preference for the local distributor over pipelines,

because functionally Alabama-Tennessee is a distributor. It purchases from another pipeline, and has no gas supply of its own. Since its function by definition is that of a middle-man the arguments that economic detriment can't be presumed from losing Corinth as a customer have a particularly hollow ring. Today's Opinion may be a death sentence for Alabama-Tennessee. It and similarly-situated pipelines will scarcely be able to withstand the "competitive" pressures of their own suppliers for the cream of their markets.

I also have reservations about the argument that there are real economies in this shift of supplier, although undeniably Corinth will realize cheaper purchased gas costs.

From the standpoint of regulation, however, the inquiry should go a little deeper. The Commission's recognition that there are offsetting costs, particularly the nonuse or premature abandonment of Alabama-Tennessee's facilities goes only part of the way. Specifically, it utilized as a measure, the unrecovered original cost. By the stress laid upon the fact "that except for possibly $40,000, all of A-T capital investment in the Corinth line will have been recovered by 1970, and the $40,000 can, if necessary, be written off by A-T over a period of years," the Commission confuses the issue. The issue is not whether Alabama-Tennessee or its stockholders have been made whole, or whether by the application of the tax laws or otherwise, the loss can be minimized. The issue is the rational use and allocation of resources.

If the expiration of the Corinth contract did not render the question largely moot, I would urge a better examination of the alternatives, under the teachings of

Scenic Hudson.[7]

One such alternative, perhaps worthy of brief outline, would require a more critical approach to Alabama-Tennessee's rates.

It could be argued that Alabama-Tennessee in strict rate theory has been receiving from Corinth a margin wider than the cost of its service to Corinth. Other customers of Alabama-Tennessee, under the same strict rate theory, have been receiving service at less than its cost.

If Alabama-Tennessee's Commission-approved postage stamp rate has efficacy, as the physical circumstances seem to indicate, then the integrity of that rate ought to be supported by the Commission. This would mean that it should not be used to measure the "savings".

CONCLUSION

In the continuing battle to protect the consumer of natural gas, the Commission has found a target of opportunity in the circumstances of Alabama-Tennessee and Corinth. Although I have joined, I strongly feel that the long-term interests of gas consumers are not being well-served by this ad hoc approach. In concentrating on cheaper gas for one small group of gas consumers right now, we may be consigning a much larger class of similarly situated consumers to discriminatorily harsher treatment over a longer period of time.

The only strategy which appears in the "savings" rationale which possibly could be of benefit to the gas consumers in other towns on the Alabama-Tennessee system

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[7] *Scenic Hudson Preservation Conference, et al* v. *Federal Power Commission, and Consolidated Edison Company of New York, Inc.*, 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966).

is that cutting Corinth from the system will serve as a warning to Alabama-Tennessee to "shape up". This may indeed be a salutary consequence; but it hardly represents firm regulation. Pipelines may read the Opinion as a warning to them, not to reduce prices, but to foreclose any further targets of opportunity of the type which was opened to Corinth.

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And finally, in the lexicon of regulation the word competition is currently getting a great deal of play. For myself, I do not see that the elimination of a Commission-certificated middleman qualifies as "competition." If it does, we've issued an open invitation to "cream-skimming" market raids which will entail added costs, not savings, in the long run.

JOHN A. CARVER, JR.
John A. Carver, Jr., Commissioner.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Docket No. CP66-336

ALABAMA-TENNESSEE NATURAL GAS COMPANY

Docket No. CP67-62

CITY OF CORINTH, MISSISSIPPI v. TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

Order Denying Rehearing, Stay and Reopening of the Record

(Issued January 29, 1968)

On December 29, 1967, both Alabama-Tennessee Natural Gas Company (A-T) and Tennessee Gas Pipeline Company (TGP) filed applications for rehearing of the Commission's order accompanying Opinion No. 534. A-T's application

alleges numerous errors of law and departures from precedent and also that the order rendered would be unfair to it. A-T also asks that the Commission order be stayed and the record be reopened to afford A-T and other parties an opportunity to present evidence on possible rate differentials, including a transportation agreement.

A-T contends that in Opinion 534 the Commission considered that the expiration of the service contract in 1970 rendered it powerless to grant A-T's 7(c) application to continue to serve Corinth. This is on improper interpretation of the Commission's ruling. We were well aware that the practical effect of refusing to grant Corinth's 7(a) application would be to force Corinth to enter into a new service agreement with A-T. Indeed, the Commission could well have required A-T to continue to serve. This was specifically recognized in

our discussion of the early retirement of facilities where it was concluded that while the impact here was insubstantial, "it is possible that in another proceeding this factor could be of such magnitude as to tip the scales against allowing a switch in supplier . . . ." Instead the Commission found that a different arrangement—the granting of Corinth's Section 7(a) application—was more in the public interest.

A-T argues that the Commission erred in allowing Corinth to switch suppliers and that this constituted a modification of its certificate in violation of Section 7(c) which it contends permits no such modification. Citing the *United* case, 31 FPC 1079, affirmed *United Gas Pipe Line Company* v. *F.P.C.*, 385 U.S. 83 (1966), A-T also argues that the Commission's conclusion that Section 7(b) abandonment provisions do not apply is an erroneous hold-

ing which would provide a "one-way street for the benefit of the purchaser."

Contrary to A-T's assertions, the Commission's action in certificating TGP to serve Corinth is not a modification of a certificate within the purview of Section 7(c). The certificate which was issued to Alabama-Tennessee for such service was issued pursuant to an application by A-T to construct facilities and serve Corinth with natural gas under a contract which provided for service until February 1, 1970. We have taken no action which interferes with that service of the certificate which authorizes it. The fact that the Natural Gas Act authorizes the Commission to require A-T to continue to serve after the expiration of its contract is not a requirement that the Commission must do so. *City of Hamilton, Ohio, et al.* v. *F.P.C.*, 37 FPC 209. As to A-T's contention that our action here is contrary to our holding in the United case, we would point out that in that case we had before us two jurisdictional companies and it was within our authority to order United to continue its purchases of natural gas from Continental Oil Company. Clearly, we have no similar authority here to require Corinth to continue to purchase from A-T. In any event, reliance on the *United* case is misplaced for even though the Commission may have authority to allow a customer to continue purchases, that case does not require the Commission to exercise such authority where the Commission deems other action more in the public interest.

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A-T claims that the Commission has not taken into account the loss that may occur because the rachet clause in its contract with TGP determines demand charges under a formula whereby for a 12-month period beginning February 1, 1970, A-T would be paying demand charges on the lost Corinth load, based on Corinth volumes for the

12 months beginning February 1, 1969. We do not agree that A-T will, in fact, suffer such detriment due to the loss of the Corinth load. Under the provisions of TGP's Rate Schedule G-1, A-T may avoid the payment of demand charges during the 12 months beginning February 1, 1970, otherwise attributable to the lost Corinth load if, prior to February 1, 1969, A-T notifies TGP that it intends to reduce its purchases as a consequence of the discontinuance of Corinth as a customer. Under these circumstances the rate schedule provides that for the 12 months following February 1, 1970, the basis for the demand charge will be either the greatest number of Mcf delivered by TGP to A-T in any one day from and after February 1, 1970, or the number of Mcf upon which the demand charge would have been computed without the Corinth load, whichever is greater.

In its application for rehearing TGP contends that looping the A-T line would be cheaper than construction of a line by Corinth, would avoid wasteful idling of existing facilities, and would preclude the necessity for construction of another meter station by TGP. It also asserts that Corinth's proposal is less economic to the public in general and could result in a bit-by-bit erosion of A-T's business and the destruction of a regional pipeline supplier which now provides an important and necessary economic service. All of those issues were dealt with by the Commission in Opinion No. 534.

The Commission finds:

The assignments of error and grounds for rehearing and reopening set forth in the applications for rehearing filed herein present no facts or principles of law which were not considered by the Commission when it

issued its Opinion No. 534, or which, having now been considered, warrant any change in, modification of, or rehearing of such Opinion and Order.

The Commission orders:

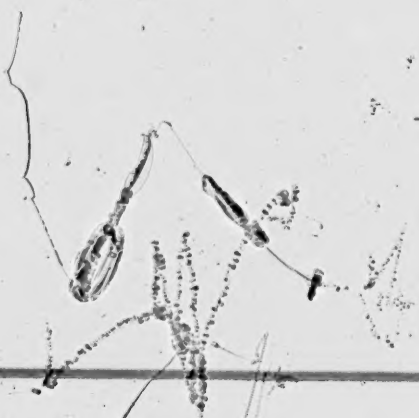
(A) The applications for rehearing are denied.

(B) The application for stay of order and reopening of the the record is denied.

By the Commission. Commissioner Carver adheres to the views set forth in his statement accompanying Opinion No. 534 issued November 30, 1967.

(SEAL)

GORDON M. GRANT,
Secretary.



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Supreme Court of the United States

OCTOBER TERM, 1969

No. 987

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, CITY OF CORINTH, MISSISSIPPI, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, CITY OF CORINTH, MISSISSIPPI, IN OPPOSITION

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